No. 88-1175

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1988

GARY R. CLARK,

Petitioner,

v.

C & O RAILWAY COMPANY,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

IS EVIDENCE OF DAMAGE CAUSED BY A FLOOD OR ACT OF GOD ON NOVEMBER 4, 1985 AND THE SUBSEQUENT WORK EFFORT TO OVERCOME THE AFFECTS OF THE FLOOD ADMISSABLE TO SHOW REASONABLE CARE EXERCISED BY A RAILROAD WHERE A RAILROAD EMPLOYEE WAS INJURED ON JANUARY 14, 1986 BECAUSE OF AN ALLEGED DEFECT IN A SWITCH.

II.

IS A RAILROAD EMPLOYEE IN A FEDERAL EMPLOYERS' LIABILITY ACT CASE ENTITLED TO AN INSTRUCTION OR EXPLANATION STATING THAT THE RAILROAD EMPLOYEE WAS NOT NEGLIGENT WHERE THE COURT RULES IN CHAMBERS THAT THE RAILROAD EMPLOYEE WAS NOT NEGLIGENT BUT REFUSED TO TELL THE JURY THAT THE RAILROAD EMPLOYEE WAS NOT NEGLIGENT?

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REFERENCE TO OFFICIAL AND UNOFFICIAL OPINIONS

This case has not been reported in any official or unofficial reports either at the trial level or at the appellate level.

GROUNDS OF JURISDICTION

The Circuit Court of Portsmouth on June 23, 1987 entered judgment on a jury verdict for the C & O Railway Company (See App. xlvii). A Petition for Appeal was timely filed by Clark with the Supreme Court of Virginia and the Petition for Appeal was denied by the Supreme Court of Virginia on August 2, 1988. (See App. xlviii) A Petition for Rehearing was then filed in the Supreme Court of Virginia and the Petition for Rehearing was denied by the Supreme Court of Virginia on September 23, 1988. (See App. xlix) This Petition for Writ of Certiorari is timely field in accordance with 28 U.S.C. 2010(c).

This Court has jurisdiction in accordance with28 U.S.C. Section 1257(3), which provides:

> By Writ of Certiorari, where the validity of a treaty

or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commissioned held or authority exercised under, the United States.

STATUTE INVOLVED

Section 51 of the Federal Employers' Liability Act provides, "Every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then the next of kin depending upon such employee, such injury or death resulting in whole or in part from the negligence in any of the officers, agents or

employees of such carrier or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharfs or other equipment. See 45 U.S.C. Section 51 Federal Employers' Liability Act.

STATEMENT OF CASE

Clark filed a Motion for Judgment against the C & O Railway Company under the Federal Employers' Liability Act seeking damages for an on the job injury that he sustained while in the employ of the C & O on January 14, 1986 due to the failure of the C & O to furnish him with a safe place to work. The C & O denied that Clark was injured, denied that the C & O was negligent, and alleged that Clark was negligent. The matter was tried before a jury in the Circuit Court of Portsmouth on May 13, 14, 15 and 18. During to the course of the trial Clark objected to the introduction of any evidence showing the flood, which occurred on November 4, 1984, and the repairs made subsequent to the flood since the injury to Clark did not occur until January 14, 1986 and was

not relevant to the case (See App. xxxiii). The Court, over the objection of Clark allowed a video to show the damage and allowed testimony by Frost to show the extensive work that was done on part of the C & O to make repairs caused by the flood. After the parties rested, Clark moved to have the Court rule that Clark was free of contributory negligence as a matter of law and have the Court tell the jury that Clark was free of negligence. The Court in chambers, out of the presence of the jury, ruled that Clark was free of negligence but the Court, despite requests by Clark, would not tell the jury that Clark was not negligent (See App. xxviii and xl). On May 18, 1987 the jury returned the verdict for the C & O. (See App. xxxviii) Clark then moved to set aside the verdict on the basis of

error during the trial and the Court overruled Clark's motion on June 23, 1987. (See App. xlvii) Clark argued on the Motion to Set Aside the Jury Verdict that the Court should have instructed the jury that Clark was free of negligence and that it was a prejudicial error to admit evidence of the flood and subsequent repairs which flood and subsequent repairs were not relevant to the accident of January 14, 1986. Clark then timely filed a Petition for Appeal with the Supreme Court of Virginia arguing that the Trial Court should have instructed the jury that Clark was free of negligence and that the Court should not have admitted evidence as to the flood conditions and subsequent repairs. The Supreme Court of Virginia denied the Petition for Appeal on August 2, 1988 (See App.

xlviii) A Petition for Rehearing was then filed with the Supreme Court of Virginia and this Petition for Rehearing was denied on September 23, 1988. (See App. xlix)

Page references in this Petition will be to the transcript unless the matter has been printed in the Appendix attached, in which case the reference will be to the Appendix filed with this Petition.

Clark, a C & O brakeman was working as a conductor on a freight train on January 14, 1986 for the C & O in the James River Subdivision between Gladstone and Clifton Forge. Wright was the engineer, Hurt was head brakeman and Nicely was the rear brakeman (T87-89). Clark was working the rear of the train in the caboose, approximately 100 cars away from the engine where Hurt, Nicely

and Wright worked. The crew and train was headed west from Gladstone to Clifton Forge but had to stop at Tyree and get on a passenger siding so the eastbound train could get through on the main line (T92). Hurt aligned the power switch at Tyree so the movement could go from the main line into the passenger siding and the train would be clear of the main line (T95). Exhibits 3 and 4, photographs of the scene and the switches, were introduced into evidence and showed the condition of the switch that existed as of January 14, 1986. Hurt manually operated the switch and it was difficult to throw and told both Nicely and Wright that it was hard to throw (T96-105). No one reported to Conductor Clark that the switch was hard to throw. After the rear of the train had cleared the switch, Clark was to manually operate

the power switch back to the position it was in to start with so that the main line train could pass. Clark was keeping in touch with the engine by radio, but, the radio was not working well (T92). Clark had to stop the rear of the train just clear of the switch so he could realign the switch (T94). Clark got off of the caboose and walked to the switch, observed the switch points and noticed there were no obstructions (T98). Clark stood in front of the switch, took a firm hold of the switch as he was trained to do, moved the switch and as the switch got about three-fourths of the way back the switch hung, causing him to lose his footing (T98-99). According to Clark, the mud and the switch hanging up caused him to lose his footing. Clark injured himself and tried to notify the

Yardmaster of his injury (T99) and later reported his injury at the end of his shift to the proper parties and filed the necessary reports.

There was a dispute as to the condition of the switch. Clark maintained that Exhibits 3 and 4 showed the condition of the switch on January 14, and that the switch was defective because there was mud around the switch, there was no ballast under the switch, there was no place to get a firm footing and there was no ballast under the switch ties (T58, 77, 104, 111, 109). Millard Thomas, an expert maintenance of way railroad employee, maintained that you had to have ballast under the switch in order to have a level place to stand and that the ballast kept the mud away (T227). Ballast was also needed under

the switch so the switch would operate correctly and not hang up.

The C & O maintained that the switch was in proper condition. Connor, a track inspector, inspected the switch on January 13, and reported that the switch was working properly (T124). Wingfield, a brakeman, operated the switch several times afterwards and indicated that the switch in question operated without difficulty and that she had no problem with her footing (T266-269). Frost, the roadmaster, tested the switch on January 20, and except for operating a little stiff maintained that the switch was normal (T196). The C & O denied that Exhibits 3 and 4 represented the condition of the switch.

Evidence showed that the switch that was operated by Clark was normally a power switch, but the switch could

not be operated by power because telephone poles carrying electrical lines had been damaged by the flood and had not been put back up. As a result, the switch had to be operated manually. Evidence did show that a power switch that was operated manually operated with more difficulty than a normal manual switch and that a power switch should only be operated manually in an emergency.

Prior to the C & O introducing evidence, Clark objected to evidence of the flood of November 4, 1985 or any evidence of repairs or work done by the C & O other than repairs in the area where Clark was injured (See App. xxxii). The Court overruled this objection and allowed the C & O to introduce evidence of the flood and subsequent repairs between Gladstone and Clifton Forge,

the area where Clark would work but not limited to the area where he was injured (See App. xxxv). Clark was injured at Tyree, which was between Gladstone and Clifton Forge but there was little damage there due to the flood. The C & O then used Frost, a roadmaster, to testify as to the conditions caused by the flood between Gladstone and Clifton Forge and showed a video to the jury showing the damage. Frost also testified as to the numerous loads of ballast that were used to fill the areas that were washed out and described in detail what the C & O did to clean up the area. However, at the place where Clark was injured the C & O did not maintain there was major damage. The power switch was not operable because lines were still not reconnected from Richmond. There was no damage to the

roadbed at the area where Clark was injured and the C & O immediately cleaned out the mud and dirt from the switch and the C & O maintained that the switch was working properly. The C & O maintained that it did not have to add any ballast or clean up any debris in the area where Clark was injured. Clark maintained that he was free of any negligence from the outset. Clark testified that he checked the switch points before operating the switch and then positioned himself in a manner he had been trained to do and then operated the switch using both hands and pulled the switch up in the fashion that he was instructed to do when the switch hung up causing him to lose his footing. The C & O introduced in to evidence the Safety Rule No. 119 which provided that if a switch required excessive

force, you should get help to operate. The C & O also called Brakeman Wingfield to testify that she would call for help if the switch was difficult to operate.

In chambers, after both parties had rested, Clark moved to strike the C & O's evidence as to Clark's negligence and asked the Court to instruct the jury that Clark was free of negligence (See App. v-xxviii). The Court ruled that Clark was free of negligence but would not tell the jury that Clark was free of negligence (See App. xxviii) and denied any instructions on contributory negligence (See App. xxx).

REASONS FOR GRANTING WRIT

This Court should grant this Petition for Certiorari because the Trial Court and the Supreme Court of Virginia did not follow the law of the Federal Employers' Liability Act and its interpretation by the Supreme Court of the United States and by other Federal Courts and State Courts.

Clark was injured on January 14, 1986 while operating, what he alleged, a defective switch. The C & O maintained that it was not defective and to show that it exercised reasonable care, introduced evidence over objection of a video and oral testimony showing damage that was done on account of a flood on November 4, 1984 and evidence of the nature and extent of repairs that were performed by the C & O between Gladstone and Clifton Forge, the line where Clark

worked on. None of the video showed damage where Clark was injured. In fact, the C & O maintained there was little damage caused by the flood where Clark was injured and no ballast was added and no repairs were done to the roadbed or around the switch. The power switch was still not working because electricity to the switch had not been restored and the switch had to be operated manually. The liberal and humanitarian purpose of the Federal Employers' Liability Act must be considered when confronting arguments that restrict an employer's liability under the act. See Sinkler v. Missouri P. R. Company, 356 U.S. 326, 78 S.Ct. 758, 2 L.Ed.2d 799 (1958); see Baker v. Baltimore and Ohio Railway Company, 502 Fed.2d 638 (6th Cir. 1974); see Rogers v. Missouri Pac. R. Co., 352 U.S. 500, 77 S.Ct.

443, 1 L.Ed.2d 493 (1957) Reh. Den. 353 U.S. 943, 77 S.Ct. 808 1 L.Ed.2d 764. The C & O had a nondelegable duty to furnish Clark a safe place to work and can not escape this duty by showing evidence of a flood and extensive damages to be repaired to the railroad tracks and equipment where the damage happened over sixty (60) days prior to the date of Clark's injury. See Shenker v. Baltimore and Ohio R. Company, 374 U.S. 1, 83 S.Ct. 1667, 10 L.Ed. 709 (1963). The Federal Employer's Liability Act did not intend that a railroad could use evidence of an Act of God to show that it acted as a reasonably prudent person meeting the standard of care under the circumstances where the flood/Act of God happened over sixty (60) days prior to the date where the railroad employee was injured. A railroad

employee cannot assume the risk of his injury by working under conditions that are dangerous no matter what the cause. See Tiller v. Atlantic Coastline R. Company, 318 U.S. 54, 63 S.Ct. 444, 87 L.Ed. 610 (1943). The Railroad by using evidence of damage caused by a flood and the nature and extent of repairs was shifting its burden of exercising due care to Clark by making him assume the risk of a dangerous condition that had not been repaired. In Gallick v. Baltimore and Ohio R. Company, 372 U.S. 108, 83 S.Ct. 659, 9 L.Ed.2d 618 (1963), the railroad employee was bitten by an insect and the railroad defended on the ground that the bite was beyond the realm of reasonable foreseeability and that there was no duty to exercise care in this regard. The Supreme Court rejected this argument and held the

railroad liable. Here the C & O knew the switch was not working by power but sent Clark on the job to use the switch and required him to operate it manually. Evidence showed that the switch should not be operated manually unless it was an emergency and the C & O was claiming that because of a flood, which occurred more than sixty (60) days before and the power lines were still out, it was still operating under an emergency. Allowing the admission of such evidence as to the railroad's standard of care in this case was prejudicial and should not have been allowed. The jury in this case was allowed to weigh and consider evidence that was too remote in time and was designed to alter the obligation of the railroad to furnish a safe place to work. The Court should not have allowed the railroad to use an

Act of God defense to defend a claim of its negligence for the maintenance of a defective switch over sixty (60) days later.

Clark, under the Federal Liability Employers' Liability Act was entitled to have the jury instructed on his theory of the case. Clark maintained that he was not negligent. The C & O maintained that he was negligent and submitted evidence to support its contention that Clark was negligent. After the parties rested Clark moved the Court to strike the C & O's evidence as to Clark's negligence which the Court did. The Court then refused to grant the C & O any instructions as to Clark's negligence but also refused to tell the jury that the Court had ruled that Clark was not negligent. During the course of the trial C & O had put

into evidence Safety Rule 119 to support its contention that Clark was negligent and introduced additional testimony from another brakeman who testified that a brakeman should call for help if excessive force was needed to operate the switch. The jury had this evidence before them and was never told by the Court that Clark was not negligent and that they should not consider any of Clark's conduct in their deliberations. The C & O argued in opening statement (T33-34) that Clark was negligent and again in closing statement that Clark was negligent even after the Court had ruled there was no evidence of Clark's negligence (T110-111). The jury could have perceived that Clark's conduct was negligent and that Clark had not carried his burden of proof to show that the railroad was negligent (See App. xlix).

The Supreme Court and other Courts have been careful to insure that the jury ruled on questions of negligence and causation under the Federal Employers' Liability Act. See Rogers v. Missouri P. R. Company, supra.; see Webb v. Illinois L. R. Company, 352 U.S. 512, 77 S.Ct. 451, 1 L.Ed.2d 503 (1957), Reh. Den. 353 U.S. 943, 77 S.Ct. 809, 1 L.Ed.2d 764. The Court by not telling the jury that Clark was not negligent deprived Clark of having the jury fully and fairly informed on the issue before it and deprived Clark of his rights under the Federal Employers' Liability Act. There were no instructions or explanations to the jury as to Clark's negligence and the jury could have concluded that because of Clark's conduct Clark failed to carry his burden of proof that the C & O was negligent.

The Court should have told the jury that Clark's negligence was not an issue and should not be considered by them.

CONCLUSION

WHEREFORE, for the reasons set forth above, the Petitioner respectfully prays that this Court grant this Petition for Certiorari to review the decision of the Supreme Court of Virginia.

Respectfully submitted this 19th day of December, 1988.

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CERTIFICATE OF SERVICE

This is to certify that I have this day mailed to Susan Armstrong and Russell Palmore at Mays & Valentine, Post Office Box 1122, Richmond, Virginia 23208-9970 counsel for respondent, C & O Railway, by mailing three copies of the Corrected Petition for Certiorari by depositing same in the United States mail postage prepaid this 13th day of January, 1989.

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IN THE SUPREME COURT OF
THE UNITED STATES

GARY R. CLARK,

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APPENDIX

MOTION OF CLARK TO HAVE THE COURT RULE THAT THE C & O WAS NEGLIGENT AS A MATTER OF LAW WHICH MOTION WAS NOT GRANTED

MR. APPLETON: I'd like to go ahead at this point and move, first of all -- and I have two of them. Do you want me to make both motions at the same time or make one, let them respond and then make the other one?

THE COURT: Give them to them one at a time.

MR. APPLETON: The first motion I have is to strike the railroad's defense, Judge, and to submit this case to the jury solely on the issue of damages, our position being that the railroad had both actual and constructive notice of a defect at the switch; that although there was evidence of some repairs done at some other points on the track, there's no evidence showing any type of repairs or maintenance done on that

track prior to Mr. Clark hurting himself, and therefore, that the railroad is in fact liable for Mr. Clark's damages. At this point, taking the railroad's evidence at its best, it shows that the ballast was deficient at the point of the switch; and even taking Dr. Bowman's testimony, Mr. Clark did in fact sustain a back sprain when he threw the switch, and that disability resulted in a period of time of at least three or four months.

MISS ARMSTRONG: Your Honor, there has not -- it is not uncontroverted that the ballast was deficient at the switch. The defendant's evidence, that was only contradicted by Millard Thomas, the plaintiff's expert who had never visited the site. The defendant's uncontroverted testimony was that the ballast was fine, it was not defective, it did not need attention, that it was



not necessary to put more ballast in that area between the flood. And in fact, they didn't put any more ballast in that area after the flood and after the switch was back on power. The evidence is that -- the defendant's evidence is that the condition as it existed at Tyree when the plaintiff alleges to have been injured was purely--it was completely adequate and did not require any additional corrective action, so Mr. Appleton's statement that the ballast was deficient, that's uncontroverted, is mistaken. It may be uncontroverted that defendant was injured but it is certainly not uncontroverted that his back was injured. All the evidence other than the plaintiff's alone is that the only injury that he received or injuries he is complaining of today -- the only injuries that he

received on January 14th were to his right shoulder and his right hip. That's all he told the emergency room doctor about; that's all he told his family doctor about; so as far as the extent of his injury, that is controverted, but more importantly, the question of actual and constructive notice of the defect at the switch is the main point in controversy here, the defendant's position being that it was not defective either at the time of the injury or later on without any corrective action being taken. (T2-4)

THE COURT: All right. That motion is denied, Mr. Appleton.

MOTION OF CLARK TO HAVE THE COURT RULE THAT CLARK WAS FREE OF NEGLIGENCE AS A MATTER OF LAW WHICH MOTION WAS SUSTAINED BY THE COURT REFUSING TO ALLOW THE C & O TO HAVE AN INSTRUCTION ON CONTRIBUTORY NEGLIGENCE (SEE C & O RAILWAY INSTRUCTION L) BUT THE COURT REFUSED TO GRANT INSTRUCTION NINETEEN.

MR. APPLETON: The next motion is to strike the railroad's defense of contributory negligence and submit the case to the jury solely on the issue of primary negligence.

THE COURT: All right. This is the one that does give me some concern. Go ahead.

MR. APPLETON: There is no evidence in this case at all, Judge, Mr. Clark did in fact undertake anything that was negligent in the conduct of his operation of the switch. He testified at direct examination that he was performing his duties in the only way practicable and during the care of those duties, he suffered an injury. The railroad comes forth with evidence showing that he maybe should have got additional help or they -- I think they've alleged in their pleadings that somehow, he threw

the switch from an awkward position. Yet, there is no evidence of any type of investigation alleging any type of problem throwing the switch, and I think more importantly, the case law on this point is clear in that once the plaintiff encounters difficulty in performing duties for the railroad and he continues to perform those duties, that any type of issues concerning contributory negligence or assumption of the risk that arise at that point clearly fall within the ambit of assumption of the risk; and assumption of the risk, as Your Honor knows, is not a defense in an FELA case.

I think if there is any type of problems with Mr. Clark's action at all in connection with this case, it certainly should come under the ambit of assumption of risk and not contributory negligence;

and thus, contributory negligence should not be given to the jury.

THE COURT: All right.

MISS ARMSTRONG: Your Honor, there are two major facts that support the defendant's claim of contributory negligence. The first is that the plaintiff has admitted that he had thrown that switch there a week earlier; that he had thrown it I believe the testimony was two or three times, but I'm certain that he said that he had thrown it there a week earlier and that the conditions when he threw it a week earlier were exactly the same as when he threw on it on January 14, 1986.

I submit to the Court that the case of Beamer vs. Virginia Railway, 181 Va., 650, is similar. That case involved a man who was making some repairs in an area that was very hot, that he knew to

be very hot; that his allegation was that having to work in this extreme heat caused his death.

What the Virginia Supreme Court said was the railway company was only required to exercise ordinary care in furnishing a safe place for Mr. Beamer to work.

Mr. Beamer had worked in the same place on many occasions, doing the same type of work he was engaged in just prior to his death. He knew the place was hot. The efficiency of the plan could not have been maintained if the heat had been eliminated. Employees are often called upon to work in places that are hot and dusty. It is hot where Mr. Beamer is working. Care's required by standards of good practice for such plants. The point here is that he knew what he was doing and he

knew -- he went there and he did it and it wasn't -- what he was called upon to do was just what he had been called upon to do before.

In addition to that, his testimony was that he had spent ten to fifteen minutes there at the switch, trying to throw that switch. He admitted that on cross-examination. Remember? We were at a bench conference and Your Honor said, "Doesn't make any sense". Well, it may not make any sense but that's what the man's testimony was and that was never cleared up, so his own testimony is that it took him ten or fifteen minutes to throw the switch; that he knew the switch was hard, and the safety rules that are in evidence say that he's supposed to get help when it's a difficult job to perform.

Miss Wingfield and Mr. Hurt's testimony has also been they were familiar with that safety rule and applied it by getting help when they needed help to throw a switch. Mr. Clark simply did not.

THE COURT: What I'm thinking about, Miss Armstrong, is this: Is that testimony, as I recall it is that you don't find out that the switch is hard until you are about two-thirds to three-fourths of the way through your task on that switch. Now, I guess you can get to that point and stop and call for help, and he didn't do that. And yet one of the cases I recollect or one of the Federal decisions is that you have to look to the realities of the work place.

This man was at the end of the train, which the testimony is was about a mile long, and the closest person was

a mile away. and his testimony was that his radio wasn't working properly anyway, but he throws the switch and again, as best I can put the testimony together, he get two-thirds to three-fourths of the way through before you find out just how hard it is, because that's when you put the pressure on to actually make the rails move from one position to another. At least that's my understanding from the testimony. And that's when his foot slips.

Now, previously, someone on the front of the train had thrown the switch the other way and now it's up to him to throw the switch back and I don't know that there's anything other than that safety rule which says that you are supposed to get help, and that controvenes, as I said, the Federal decision that I read which says that

you have to look to the realities of the work place, and I -- I question whether there is sufficient evidence of negligence on the part of the -- of contributory negligence to let that go to the jury. It really concerns me.

MR. PALMORE: You Honor, we have had the testimony, the trial testimony transcribed.

THE COURT: All right.

MR. PALMORE: And if you will yield-

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MISS ARMSTRONG: Sure

MR. PALMORE: He was asked, and he -- it was referred to his deposition, his earlier deposition. He said that, "It was tight all the way through but I got three-fourths of the way through the movements when it got real tight." "It was tight all the way through but I was three-fourths of the way through

the movements and it got real tight. I was shoving so hard, I lost my footing."

Question to me on -- my question on cross: "You knew that it was tight all the way that you were pushing it over, didn't you?

"Answer: I knew the switch was hard to throw; yes, sir.

"Question: You knew it was hard to throw and you were feeling some tightness in it when you said it hung."

Later on, he was asked was the switch -- I can find this for you in the transcript: was the switch on the date that you found it in terms of the condition of the switch, that is, the area surrounding it and the way that it was thrown, the same as it had been the two or three times the week before? He said yes.

And so take that -- let me suggest you take that, and here's a man that admits -- even though it may stretch the imagination -- ten to fifteen minutes. What he is saying here is that he is pushing ten to fifteen minutes.

"Answer: You know, somewhere in the neighborhood of ten to fifteen minutes.

"Is that the question that I asked you in your deposition?

"Yes, sir. And that was my response."

So whether or not it stretches the imagination to believe that that actually happened, what the jury could very well have is a man that knew the switch was tight, he had thrown it two or three days -- or two or three times the week before. He knows that it's tight all the way through. He's pushing so hard for ten or fifteen minutes, when it

normally takes two, when his foot gives way.

Now, I suggest that he did have a radio. It may not have been working as well as it could have been, but he used it twice to tell the train to move forward. Remember? The first time, the train slacked back so then he had to get on the radio and ask it to move foreward again to clear the switch point area and then after he threw the switch, he telephoned them to say that he had been injured and that the switch was cleared.

Betty Wingfield said if she's at the end of the train and she can't throw the switch, she is going to radio her conductor or she is going to radio for some help, and I think that at this point, there is clearly a jury issue of contributory negligence and I think it

comes right out of the mouth of Gary Clark.

MR. APPLETON: Judge, I think that both these points have been ruled on by Federal jurisdictions. Nixon vs. Penn Central Railroad, its United States Court of Appeals coming out of the Sixth Circuit. It was decided July 27, 1973. That Court held that a defendant's not entitled to reach the jury on an issue on which the defendant bears the burden of proof on nothing but the incredibility of the plaintiff's testimony. Other evidence of the matters to be proved must be adduced.

I think that Mr. Clark's testimony concerning the time dealt more with the length of time from leaving the caboose to returning to the caboose as opposed to actually throwing the switch.

When you talk about his knowledge of the conditions previously to throwing it, that case was dealt -- or that issue was dealt with in Mumma vs. Reading, United States District Court from the Eastern District of Pennsylvania, decided November 9, 1965: "Under ordinary circumstances, knowledgeable acceptance by an employees of dangerous conditions when such acceptance is necessary for the performance of his duties is assumption of the risk, although under extraordinary circumstances, assumption of the risk may in itself be so unreasonable that no prudent man would expose himself to it".

I think in this case, that it's clearly evident that Mr. Clark didn't know how hard it was for Hurt to throw that switch. He knew that the switch had been thrown; he knew that the train

moved in the siding; he knew that his job was to throw it; he knew there was only one way to throw that switch, and that was to stand in that mud; and he knew that as he got it about half way up, I think he testified to, that he ran into problems. And I think once he undertook that task and he began to throw that switch, the difficulty that he encounters and any actions which he has that might constitute negligence fall under assumption of the risk.

I think the Virginia Supreme Court cases are clear that assumption of the risk is characterized as being venturesome while contributory negligence is characterized as being reckless. I don't think Mr. Clark's actions in this case can be characterized as reckless. He was doing what the railroad told him

to do and he was hurt doing it. It's that simple.

MR. PALMORE: I don't think it is that simple, and if you look at the testimony, the question was, in his deposition, "How long would you estimate it took you at the switch? I'm not talking about how -- about the time that it took you going back and forth to the caboose when the slack action rolled back. I'm talking about when you were actually at the switch, trying to throw it. How long did you spend there?" Couldn't be any clearer than that.

"Well, it happened so quick. Maybe ten or fifteen minutes."

THE COURT: So those two answers are almost mutually exclusive.

MR. PALMORE: "It happened so quick", when he was hurt: "Perhaps maybe ten

or fifteen minutes. I'm not sure. I can't quote the exact time, you know? Maybe somewhere in the neighborhood of ten to fifteen minutes."

MISS ARMSTRONG: And he admits that he was familiar with the safety rule that told him how to throw it and the safety rule could have no application, Your Honor, unless somebody had attempted to throw a switch. How else would they know that they were having difficulty throwing the switch? They would have to start to throw the switch. And that is when the safety rule tells them if it is hard to throw, get help. And the evidence of Betty Wingfield corroborates that point.

MR. APPLETON: Judge, as far as the safety rule goes, that is not the law. That is something that, you know, that the railroad makes up itself to exculpate

itself in cases like this. I think that the case law is one thing; the safety rule is something else.

THE COURT: Well, the cases I read on this thing give me great pause because --

MR. PALMORE: Are you familiar with the Beamer case, Your Honor? The case that Susan read?

THE COURT: Talking about the heat?

MR. PALMORE: Yes, sir.

THE COURT: Well, I was reading some FELA cases.

MISS ARMSTRONG: That is an FELA case. The headnotes in that that are highlighted address what we are talking about.

MR. PALMORE: It does.

THE COURT: Let me see.

MR. APPLETON: What is the year in that case?

MR. PALMORE: Forty-five.

MISS ARMSTRONG: And the only cases that Mr. Appleton cited happen to be Pennsylvania Third Circuit cases. He doesn't have any Fourth Circuit.

MR. APPLETON: I have a lot of other cases, too: Wilson vs. Burlington Northern. That is a Fourth Circuit case decided in '82. Atlantic Tiller vs. Atlantic Coastline Railroad, 318 S Ct. 54. I don't know that I can get much higher than that.

MR. PALMORE: What he is saying is that there is no reason and no room for a jury to conclude otherwise. That is, basically what he is asking the Court to decide, to take this from the province of the jury is to in effect say reasonable people could not disagree.

MR. APPLETON: That's exactly what

I'm saying, Judge. I think the case law is clear.

MR. PALMORE: I think that is black letter and I think if you review what we just said to Your Honor and view his testimony --

THE COURT: Wait for me just a minute. You all wait for me just a minute.

(Whereupon, the proceedings continued following a brief recess.)

THE COURT: Have you got a copy of that Burlington case?

MR. APPLETON: Yes, sir. First of all, here is the memo we prepared and then let me give you a copy of the case.

THE COURT: Are you sure this is a -- this is an Eighth Circuit case. But the language in herethat worries me is the railroad's argument simply is not

consistent with the realities of the work place.

When you've got a -- when you've got a train where the man is by himself to throw the switch and the nearest help is a mile away, it's just not realistic to anticipate that he is going to call for help from a mile away. That's my recollection now of how long that train was, was a mile.

MISS ARMSTRONG: Hundred cars.

MR. THOMPSON: At fifty-two feet each, 5,200 feet: a mile. That's right.

THE COURT: He said it was a mile. Somebody testified it was a mile.

MISS ARMSTRONG: Betty Wingfield was asked the question even if --

THE COURT: Betty Wingfield is a slight young woman and I imagine she might need help on every switch.

MISS ARMSTRONG: So? If the plaintiff has --

THE COURT: So they wouldn't put her in a position where she was by herself.

MISS ARMSTRONG: She testified that they do and that she does call for help. Even when the question was asked to her on redirect -- I don't remember whether it was direct or redirect.

MR. PALMORE: I asked her whether she ever needed help and I asked her if she asked for it and she said, "I don't like to ask for it but I've asked for it."

MISS ARMSTRONG: You also asked her if she was by herself when she asked for help at the rear of the train and she said yes: that is where she usually works, at the rear of the train. So

the realities of the work place has been testified to through Betty Wingfield.

MR. PALMORE: Our Supreme Court certainly is as persuasive as the Eighth Circuit. I mean, we are talking about the same Federal act We are talking about the Supreme Court here.

MR. APPLETON: I think that the facts in cases that I've cited to the judge are somewhat more relevant. Plus, these cases are certainly more contemporary.

Judge, I don't -- Miss Wingfield testified over my objection during trial anyway. She said she needs help throwing some switches sometimes. There was never any testimony as to when or how or anything else. She's in the back of a train; she needs help. I don't know that that has any relevance to the -- to this case.

MR. PALMORE: Well, that's in.

MR. APPLETON: I know that this is over my objection, but you are arguing it and I think it's got to be given proper weight.

THE COURT: Well, I've got to do something and I'm going to -- I'm not going to let you give the instruction on the contributory negligence. And note your objections. There's plenty of objections in this. (T4-20)

DEFENDANT'S JURY INSTRUCTION NO. L

The railroad contends that Mr. Clark's contributory negligence in his inspection and operation of the switch was a cause of the injuries and damages which he may have sustained. By the defense of contributory negligence, the railroad in effect alleges that Mr. Clark, by his own failure to use ordinary care for his own safety under the

circumstances, caused or contributed to cause the injury and damages he suffered.

The burden is on the railroad to establish by a preponderance of the evidence that Mr. Clark was negligent, and that such negligence contributed to cause the injury and damages he sustained. Under the Federal Employees' Liability Act, if you find from a preponderance of the evidence that the railroad is liable for the breach of some duty to Mr. Clark, but that Mr. Clark himself was guilty of some contributory negligence which caused or contributed toward bringing about his own injury, you must first determine the amount of damages which you think he has sustained; and you should then diminish Mr. Clark's damages by an amount equal in proportion to that which his negligence bears to

the total negligence of both Mr. Clark and the railroad, if any.

Clark vs C&O 1987

DENIED 5/18/87

LCM

PLAINTIFF'S JURY INSTRUCTION NO.: 19

The Court instructs the jury that as a matter of law, the plaintiff, Gary R. Clark, was free of any negligence which caused or contributed to cause his injury.

REFUSED 5/18/87

LCM

OBJECTION TO REFUSING TO GRANT PLAINTIFF'S JURY INSTRUCTION NO.: 19

MR. APPLETON: And then Instruction No. 19. I've looked at your other ones and I think those are really the only two.

THE COURT: Number 19? Which one is that?

MR. APPLETON: The one I gave to you at the end. It says, "The Court --"

THE COURT: Okay. Your proposed instruction, and we'll put proposed Instruction No. 19. Will you so note that?

MR. APPLETON: Yes, sir.

THE COURT: Make that a proposed instruction. That's the instruction which would restate that the plaintiff was free of all negligence?

MR. APPLETON: Yes, sir.

THE COURT: Is that what it amounts to? All right; and of course you excepted to that. (T135-137)

MR. APPLETON: Objections are as follows: On Instruction No. 19 that was refused by the Judge, it reads, "The Court instructs the jury as a matter of law the plaintiff, Garry R.

Clark, was free of any negligence which caused or contributed to cause his injury". The basis for my objection to the refusal is that the Judge had already ruled that contributory negligence was not an issue in this case and in an FELA case, since assumption of the risk is not a defense, he has in essence ruled that the plaintiff is free of negligence, and this was essential to correctly insturcting the jury on the issues of law before it. (T137-138)

OBJECTION TO EVIDENCE OF FLOOD

MR. APPLETON: Okay; so you are not going to make any motions now?

Judge, I have a motion to make pending them starting their evidence. It appears that there is going to be extensive testimony concerning repairs and maintenance done to areas on the James River subdivision other than the

switch that's involved in this case. I submit to the Court that that's irrelevant and all the testimony needs to be confined to the switch that Gary Clark claims he was injured on on January 14, 1986. They've got a duty to make the area where he was working reasonably safe. What they did a mile down the track or two miles down the track, it doesn't have anything to do with the area where he was injured.

MR. PALMORE: We have a duty to use reasonable care under the circumstances as they exist at the time. The question is and the law is did we breach our duty of care to exercise -- did we breach any duty to exercise reasonable care under the circumstances? That is clearly the law. And I think that given the nature of the circumstances as they existed along the entire line,

clearly, clearly it is relevant as to what the railroad was doing in trying to clean up and trying to put this track back in order, and to me, the evidence with respect to what was going on, what was having to be done clearly goes to what that position of the law is.

MR. APPLETON: Judge, my position is just we've already heard from the railroad in opening statement, "We knew that the track was --"

MR. PALMORE: Heard from me.

MR. APPLETON: "-- washed out." WEll, you are the railroad.

MR. PALMORE: I'm not going to say anything.

MR. APPLETON: "We knew the track was washed out". They knew it was in bad shape; they knew it was a dangerous condition. They got my client down there. They are going to say, "We

fixed the other areas. We didn't have time to get to the area where Gary Clark was injured".

MISS ARMSTRONG: His point was well taken. They heard there was extensive damage and what they might get from that, they have to have the relative damage -- other damage at relative places.

THE COURT: Gary Clark worked on it from -- I can't think of the name of the place -- Glad Stone to Clifton. THat was the area.

MISS ARMSTRONG: Clifton Forge.

THE COURT: Clifton Forge. That's the area that he worked on and that's the area that I think you ought to limit your expressions to.

MISS ARMSTRONG: Fair enough.

MR. PALMORE: That's the James River subdivision.

MR. APPLETON: We have an agreement between us, it it's all right with you, that any testimony concerning work done on that switch will be subject to my objection to relevancy.

THE COURT: Okay. (T10-12)

MR. APPLETON: Does it show the part where Mr.Clark got hurt, the part of the track where the switch was?

MISS ARMSTRONG: I don't believe it does.

MR. APPLETON: My objection to that would be the same as to the other testimony.

THE COURT: Right.

MR. APPLETON: Concerning relevance.

THE COURT: Continuing.

MR. APPLETON: Yes, sir. (T111)

Q. Now, with respect to the condition of the James River subdivision during

this period of time, what was the general condition of the overall subdivision?

MR. APPLETON: Judge, I'm going to object based on your ruling earlier. I think you confined his examination to points between Clifton Forge and Gladstone.

MR. PALMORE: All right.

BY MR. PALMORE:

Q. Between Gladstone and Clifton Forge, what if any effect had the flood had on that stretch of track?

A. Well, that stretch of track in there wasn't really hurt as bad as a lot of it on west of there. (T141-142)

VERDICT OF THE JURY

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

GARY R. CLARK,
Plaintiff

vs. AT LAW NO.: L-86-415

THE CHESAPEAKE & OHIO
RAILWAY COMPANY,
Defendant.

On this the 18th day of May, 1987, again came the parties in person and by their Attorneys and Court convened as of its adjournment of Fri. May 15, 1987, and the jurors sworn to try the issue again joined in this case appeared in Court according to their adjournment and after fully hearing all the argument of counsel, the jury retired to their room to consult of their verdict and after sometime returned into Court having found the following verdict: We, the jury, find for the defendant, signed Bernard M. Brown, Foreman, 5-18-87. ;whereupon the plaintiff, by counsel, moved the Court to set the verdict to the jury aside and to grant him a new trial on the grounds that said verdict is contrary to the law and the evidence,

which motion being heard, the Court doth continued generally.

5/28/87

LCM

Entered 5-28-87

LB

HEARING ON MOTION TO SET ASIDE JURY VERDICT

MR. APPLETON: Judge, first point I'd like to bring up, which is probably the one that causes me the most concern; certainly like to talk to you about initially: When we went through the jury instructions on this case, I asked the Court to grant me the instruction that says, "The Court instructs the jury as a matter of law that the plaintiff, Gary R. Clark, was free of any negligence which caused or contributed to his injury", and you refused it despite the fact that you had ruled as

a matter of law that Mr. Clark was not contributorily negligent.

THE COURT: Let me say this: What I did is I refused an instruction offered by the defendant on contributory negligence.

MR. APPLETON: It was my understanding that you had ruled that you had struck the defense of contributory negligence.

THE COURT: Well, in essence that's what I did, becuase I refused their instruction on contributory negligence and I refused your instruction on contributory negligence.

MR. APPLETON: I think after you had ruled, this was what I offered. I didn't offer a contributory negligence instruction. I offered the --

THE COURT: I know you didn't. The defendant did.

MR. APPLETON: Yes, sir.

THE COURT: And I denied it.

MR. APPLETON: Yes, sir. And it's my position that in light of the ruling on the contributory negligence on my motion at the conclusion of defendant's evidence, that this -- the denial of my request for this instruction allowed the jury to speculate as to Mr. Clark's negligence. There had been continual testimony or evidence. There had been continual testimony or evidence brought forth concerning safety procedures, requesting instruction or requesting assistance and all those things lying in the realm of the contributory negligence issues, and since the jury was not instructed that Mr. Clark was not contributorily negligent, they were allowed to speculate as to his negligence in this case.

THE COURT: All right.

Miss Armstrong?

MISS ARMSTRONG: Your Honor, it seems to me that once the contributory negligence count was struck, that it wasn't appropriate to have any instruction go to the jury, and that's what the Court did. Contributory negligence, it's just as -- once the contributory negligence count was struck, it's just like contributory negligence was not an issue in this lawsuit and it was therefore not appropriate to instruct them in any way on the point so I believe that what the Court did in that regard is exactly what it should have done, which was not to instruct them either way as either the plaintiff or the defendant requested. It wasn't an issue and therefore there was no reason, no need. It would not have been appropriate to instruct them on that point.

THE COURT: All right. What else do you have?

MR. APPLETON; Judge, the next point that I have to bring up is just a renewal of my objection to the testimony of Miss Wingfield and the testimony or the evidence that came in through the videotape of the flood. The evidence that the defendant presented at trial was that the flood was not shown at the point where Mr. Clark was injured; that all the other flooding was really irrelevant to this case, and it simply misled the jury to the extent of the nature of the damage at the point where Mr. Clark claims he was injured. The testimony at trial was that the film showed damage from mile post 147 to 165 and as the Court recalls, Mr. Clark was injured at mile post 143. Mr. Frost, who verified the film, also testified

specifically that the point of the injury was not on the film so I don't think it was relevant to the jury's determination of the issue of liability in this case.

THE COURT: All right.

Miss Armstrong?

MISS ARMSTRONG: Your Honor, it was extremely relevant to the issue of liability in this case in that as the instruction that the Court gave the jury, which was a proper instruction, the jury had to determine what was reasonable under the circumstances, and the flood was definitely a circumstance of this case: a circumstance that was very involved in this case. Indeed the testimony was that because of the flood, the switch that the plaintiff alleges to have been injured on had to be thrown manually whereas usually, it was a

power switch. It was important for the jury to understand the damage that the flood caused so that the jury could understand the reasonable way in which the railrod reacted to that flood, so it would be totally inappropriate to ask the jury to make a decision as to what was or wasn't reasonable on behalf of the railroad without allowing them to make that decision in context, without allowing them to understand the extremely unusual circumstances with which the railroad was dealing. (T2-6)

TRIAL COURT'S OPINION OVERRULING MOTION TO SET ASIDE VERDICT

June 19, 1987

Randall E. Appleton, Esquire
Suite 201, J. J. Henry Building
P. O. Box 1138
Portsmouth, Virginia 23705

Susan C. Armstrong, Esquire
Mays and Valentine
P. O. Box 1122
Richmond, Virginia 23208

Re: Gary R. Clark v.
The Chesapeake and Ohio Railway Company
At Law No.: L-86-415

Dear Ms. Armstrong and Mr. Appleton:

Reference is made to the Motion to Set Aside the Jury Verdict which was heard on Monday, June 15, 1987.

Please be advised I am overruling the motion and will enter the verdict for the defendant in this case.

Very truly yours,
L. Cleaves Manning, Judge

COURT ORDER ENTERING JUDGMENT ON JURY VERDICT

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

GARY R. CLARK,
Plaintiff,

vs. AT LAW NO.: L-86-415

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Defendant.

On this the 15th day of June, 1987, came again the parties by their Attorneys and the Court having fully heard the

motion of the plaintiff to set aside the verdict of the jury heretofore rendered herein, and to grant him a new trial on the grounds that said verdict is contrary to the law and the evidence, which motion the Court doth overrule, and judgment is entered on the verdict, therefore it is Considered by the Court that the defendant go thereof without day and recover of the plaintiff its costs by it in this behalf expended and this case is removed from the docket.

ENTER 6/23/87

LCM

ORDER OF SUPREME COURT OF VIRGINIA DENYING PETITION FOR APPEAL

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 2nd day of August, 1988.

Gary R. Clark, Appellant,

against Record No. 871094
Circuit Court No. L-86-415

The Chesapeake and Ohio
Railway Company, Appellee.

From the Circuit Court of the City of
Portsmouth

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

By: R. R. Re

Deputy Clerk

ORDER OF SUPREME COURT OF VIRGINIA DENYING PETITION FOR REHEARING

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 23rd day of September, 1988.

Gary R. Clark, Appellant,

against Record No. 871094
Circuit Court No. L-86-415

The Chesapeake and Ohio Railway Company, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 2nd day of August, 1988 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Dail B. Duck, Clerk

INSTRUCTION NO. 6

The Court instructs the jury that it was the continuing duty of the Chesapeake and Ohio Railway Company, as

an employer at the time and place in question, to use ordinary care under the circumstances in furnishing the plaintiff with a reasonably safe place in which to work and to use ordinary care under the circumstances to maintain and keep such place of work in a reasonably safe condition.

The Court instructs the jury that it is a continuing duty of the Chesapeake and Ohio Railway Company to use reasonable care to provide Gary R. Clark with reasonably adequate and efficient equipment with which to perform his work.

The Federal Employers' Liability Act does not, however, give an employee the right to recover simply because he has been injured while working for the railroad. Moreover, the railroad is not an insurer of its employees' safety and is not required to provide an

absolutely safe place for its employees to work. The mere fact that an accident occurred and that plaintiff was injured creates no presumption that the injury was caused by the negligence of the railroad. The plaintiff, Mr. Clark, must prove by a preponderance of the evidence that his injuries were caused by the railroad's negligence. If you find that the preponderance of the evidence is favorable to the railroad, or that the weight of the evidence is evenly balanced, then Mr. Clark has not borne his burden, and you must return your verdict for the railroad.

If you believe from a preponderance of the evidence that the Chesapeake and Ohio Railway Company failed to exercise reasonable care in the performance of its duties and that such failure was the cause of or contributed in any

degree to cause the injuries to the plaintiff, then you shall return a verdict for the plaintiff.

Granted

5/18/87

LCM